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November 27, 1996

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VIA HAND DELIVERY

Mr. William F. Caton, Acting Secretary
Federal Communications Commission
Room #222
1919 M Street, N.W.
Washington, DC 20554

Re: In the Matter of Implementation of Section 255
of the Telecommunications Act of 1996, Access to
Telecommunications Services, Telecommunications
Equipment, and Customer Premises Equipment by
Persons with Disabilities

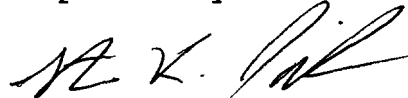
Dear Mr. Caton:

Enclosed please find for filing on behalf of Motorola, Inc. ("Motorola") an original and four copies of Motorola's Reply Comments in connection with the above-referenced proceeding.

Also, enclosed please find one copy of Motorola's Reply Comments to be date stamped and returned with our messenger.

If there are any questions concerning this filing, please do not hesitate to contact me.

Respectfully submitted,



Steven K. Davidson
Counsel for Motorola, Inc.

Enclosures

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FEDERAL COMMUNICATIONS COMMISSION

Before The
FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C.

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In the Matter of)
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Implementation of Section 255 of the)
Telecommunications Act of 1966)
)
Access to Telecommunications Services,)
Telecommunications Equipment, and)
Customer Premises Requirement)
By Persons with Disabilities)

WT Docket No. 96-198

REPLY COMMENTS OF MOTOROLA, INC .

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Dated: November 27, 1996

SUMMARY

Motorola strongly supports the goal of providing telecommunications equipment, services and CPE, to persons with disabilities, embodied in Section 255 of the Telecommunications Act of 1996 ("Act"). 47 U.S.C. 255. As a member of the Telecommunications Access Advisory Committee ("TAAC") established by the Architectural and Transportation Barriers Compliance Board ("Access Board"), Motorola has been an active participant in exploring the ways that the goals of Section 255 can best be achieved.

Motorola is encouraged that a consensus appears to have emerged with respect to several key issues addressed by Motorola in its initial comments in response to this Notice of Inquiry ("NOI"), including: (1) the Commission should play a significant role in implementing Section 255; (2) Section 255 should be applied equitably to different types of companies -- large and small, foreign and domestic; and (3) the definition of "disability" should be given a more narrow application in the telecommunications context than provided for in the Americans with Disabilities Act ("ADA").

In addition, Motorola expresses its concerns and views with respect to more controversial issues. Motorola believes that the Commission should: (1) conduct substantive review of the

guidelines developed by the Access Board; (2) decline to consider the resources of parent corporations in the readily achievable determination; (3) implement the readily achievable standard in a way that will further technological innovation rather than unnecessarily divert resources from accessible product design and development; and (4) assess compliance with Section 255 based upon the availability of accessible telecommunications equipment and CPE in the marketplace as a whole.

TABLE OF CONTENTS

PAGE

I.	THE INITIAL COMMENTS REFLECT A CONSENSUS AMONG INDUSTRY AND ADVOCATES FOR THE DISABLED ON SEVERAL KEY ISSUES	3
A.	Most Commentors Agree That the Commission Should Play a Significant Role in Implementing Section 255	3
B.	Commentors From Both Industry and the Disabled Community Agree That Section 255 Should Be Applied Equitably to Manufacturers, Regardless of Size or Location	6
C.	Most Commentors Agree That the Definition of "Disability," Taken From the ADA, Applies More Narrowly In the Telecommunications Context	7
II.	THE RESOURCES OF PARENT CORPORATIONS SHOULD NOT BE CONSIDERED IN DETERMINING WHAT IS READILY ACHIEVABLE	8
A.	The Nature of Product Design and Development in the Telecommunications Industry Weighs Against Considering the Resources of Parent Corporations in Determining What Is Readily Achievable	9
B.	By Declining to Consider the Resources of Parent Corporations, the Commission Will Promote an Equitable Application of Section 255 To Large and Small Manufacturers	11

III. THE READILY ACHIEVABLE STANDARD SHOULD BE APPLIED WITH A LONG-TERM GOAL OF PROMOTING, RATHER THAN CONSTRAINING TECHNOLOGICAL INNOVATION	12
A. Section 255 Should Be Implemented With An Emphasis on New Products and Should Not Be Interpreted to Require Retrofitting	12
B. The Commission Should Ensure That Any Design Process Standards Ultimately Adopted Do Not Divert Resources From Accessible Product Design and Development	13
1. Declaration of conformity	14
2. Consultation with the disabled	18
IV. COMPLIANCE WITH SECTION 255 SHOULD BE ASSESSED BASED UPON THE OVERALL ACCESSIBILITY TO THE DISABLED OF EQUIPMENT AVAILABLE IN THE MARKETPLACE, NOT WHETHER EACH PRODUCT MODEL BY EACH MANUFACTURER IS ACCESSIBLE	19

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REPLY COMMENTS OF MOTOROLA, INC.

INTRODUCTION

Motorola submits these reply comments in response to the Commission's NOI in this proceeding,^{1/} released on September 19, 1996. As Motorola indicated in its initial comments, Motorola has been, and continues to be, firmly committed to

^{1/} In the Matter of Implementation of Section 255 of the Telecommunications Act of 1996, Access to Telecommunications Services, Telecommunications Equipment, and Customer Premises Equipment by Persons with Disabilities, Notice of Inquiry ("NOI"), WT Docket No. 96-198 (rel. Sept. 19, 1996).

manufacturing telecommunications equipment^{2/} that is accessible to persons with disabilities.

As a threshold matter, Motorola would like to thank the Commission for conducting this NOI process. Motorola believes that this NOI has been extremely valuable in several respects.

First, this NOI and the comments submitted in response have demonstrated that industry and disabled consumers are in substantial agreement with respect to many important issues.

Second, this NOI has generated a great deal of information as well as numerous proposals for creative and collaborative implementation of Section 255. Motorola is encouraged by the cooperative attitude reflected in the comments of both industry and advocates for the disabled. Motorola is hopeful that industry and the disabled community can work together to make an increasing range of accessible equipment available to disabled consumers.

^{2/} For the purpose of the comments, Motorola uses the term "telecommunications equipment" to include both telecommunications and customer premises equipment as those terms are defined in the Act. 47 U.S.C. §§ 153(a)(38),(50).

I. THE INITIAL COMMENTS REFLECT A CONSENSUS AMONG INDUSTRY AND ADVOCATES FOR THE DISABLED ON SEVERAL KEY ISSUES

In reviewing the submissions by other commentors, Motorola was pleased to find a consensus among industry and advocates for the disabled on several key issues addressed by Motorola in its initial comments. Most commentors agree that: (1) the Commission should play a significant role in implementing Section 255; (2) Section 255 should be applied equitably to different types of companies -- large and small, foreign and domestic; and (3) the definition of "disability" has a more narrow application in the telecommunications context than provided for in the ADA. At this early stage of Section 255 implementation, these areas of consensus are extremely significant and merit brief discussion.

A. Most Commentors Agree That the Commission Should Play a Significant Role in Implementing Section 255

Many of the commentors that responded to the NOI agree that the Commission has a significant role to play in implementing Section 255. At minimum, the Commission will take a substantial role in implementing disability access requirements since it possesses exclusive jurisdiction to resolve any

complaints filed under Section 255.^{3/} 47 U.S.C. § 255(f). Many commentors support the Commission taking a more broad role in Section 255 implementation, specifically, by actively participating in the development of guidelines by the Access Board. Section 255 expressly requires such participation by the Commission, directing the Access Board to develop guidelines for accessible equipment and CPE "in conjunction with the Commission." 47 U.S.C. § 255(e). Therefore, Section 255 expressly contemplates that the Access Board will have the benefit of the Commission's unique expertise and experience in the telecommunications industry.

Furthermore, most commentors agree that the Commission should take some independent action with respect to the guidelines ultimately promulgated by the Access Board. Although

^{3/} Section 255(f) expressly bars private rights of action to enforce disability access requirements.

Some of the comments submitted in response to this NOI disregard this express statutory bar and suggest that some private right of action might be available. For example, the National Association of the Deaf ("NAD") suggests that a private right of action would be available against common carriers.

Other commentors such as the Consortium for Citizens with Disabilities ("CCD"), United Cerebral Palsy Associations ("UCPA") and Jo Waldron argue that there will substantial areas of overlap between Section 255 and the ADA. While some areas of overlap may exist, this overlap should not in any way be used to circumvent the bar against private rights of action contained in Section 255. The ADA authorizes private rights of action; Section 255 prohibits them.

many commentators agree in principle with the Commission taking action in response to the Access Board's guidelines, industry and advocates for the disabled currently disagree as to what form the Commission's response should take.

Motorola, TIA,^{4/} and Ericsson,^{5/} among others, believe that the Commission should not accept the guidelines developed by the Access Board without exercising extensive substantive review. As the exclusive enforcement authority, the Commission should exercise substantive review of the Access Board's guidelines to ensure that they are both reasonable and will in fact promote the goal of Section 255: to provide an increasing range of telecommunications equipment accessible to the disabled.

Moreover, the Commission should substantively review the Access Board's guidelines because only the Commission has authority to regulate the entire telecommunications industry. The Access Board has statutory authority to develop guidelines related only to telecommunications equipment and CPE. 47 U.S.C. § 255(e). As a result, the Commission must apply its unique experience and expertise to ensure that the burden of compliance has been allocated fairly between manufacturers and service providers. Indeed, some advocacy organizations that support a

^{4/} Telecommunications Industry Association ("TIA") at 3.

^{5/} Ericsson at 4-6.

notice and comment rulemaking to implement Section 255 implicitly recognize the need for the Commission to review and to coordinate the allocation of responsibility among industry participants.^{6/}

Consequently, the Commission should take an active role in both developing guidelines "in conjunction with" the Access Board and reviewing those guidelines to determine whether they in fact further the goal of access for the disabled.

B. Commentors From Both Industry and the Disabled Community Agree That Section 255 Should Be Applied Equitably to Manufacturers, Regardless of Location

Most commentors agree that Section 255 should be applied equitably to different types of companies, whether foreign or domestic. This principle of equity requires that telecommunications equipment and CPE be subject only to the accessibility requirements of the country in which these products are sold. Applying this principle, the Commission should require telecommunications equipment sold in the United States to comply with Section 255, regardless of where those products are manufactured.^{7/} Conversely, domestically manufactured

^{6/} See American Speech-Language Hearing Association ("ASHA") at 1-2; Jo Waldron at 20.

^{7/} For this reason, the Commission should not consider the efforts undertaken by foreign manufacturers to comply with access requirements imposed by other countries in determining what is readily achievable under Section 255.

telecommunications equipment intended for export should be exempt from Section 255 and subject only to whatever disability access requirements are imposed by the point-of-sale country.

C. Most Commentors Agree That the Definition of "Disability," Taken From the ADA, Applies More Narrowly In the Telecommunications Context

Among commentors that addressed the definition of "disability," most agree that the definition has a more narrow application in the telecommunications context than in the ADA context. In this NOI, the Commission requested comment as to how a record or perception of disability, which are both subject to protection under the ADA definition, might apply in the context of telecommunications.

Once again, a consensus exists related to this issue because narrowing the ADA definition of disability in the telecommunications context makes sense. A disability that is relevant to Section 255 is "a physical or mental impairment that substantially limits" a "major life activit[y]," 42 U.S.C. § 12102(a)(2), the ability to access telecommunications equipment, services, and CPE. Under the current state of telecommunications technology, neither a record nor a perception of disability impedes access to telecommunications.^{8/}

^{8/} Only two commentors, CCD and UCPA contend that the ADA definition should be retained in its entirety.

As a result, the ADA definition of "disability" should be narrowed to include only those individuals with an active, present disability that substantially interferes with their ability to access telecommunications services, equipment, and CPE.

II. THE RESOURCES OF PARENT CORPORATIONS SHOULD NOT BE CONSIDERED IN DETERMINING WHAT IS READILY ACHIEVABLE

Admittedly, disabled consumers and industry substantially disagree as to whether a parent corporation's resources should be considered. On this issue, the Commission should adopt the view, promoted primarily by industry, that the resources of parent corporations should not be considered in the readily achievable determination.

As a threshold matter, it is important to remember that the statutory definition of "readily achievable" does not require the Commission to consider a parent corporation's resources.^{2/} The Commission should not follow DOJ's example in the ADA context by adding the resources of parent corporations as

^{2/} The definition of "readily achievable," incorporated from the ADA, lists a number of factors to be considered, including "the overall financial resources of the covered entity." 42 U.S.C. § 12181(9). The Department of Justice ("DOJ") issued regulations to implement the ADA, which added the resources of a parent corporation as another factor. 28 C.F.R. § 36.104 (1995).

an additional factor to be considered in determining what is readily achievable.

By declining to consider the resources of parent corporations, the Commission would more closely tailor Section 255's requirements to the reality of prevailing industry practice, and would also promote equitable application of the Act to large and small companies because all profit centers of similar size would be treated equally.

A. The Nature of Product Design and Development in the Telecommunications Industry Weighs Against Considering the Resources of Parent Corporations in Determining What Is Readily Achievable

As Motorola and many other industry commentators argued in their initial comments, consideration of a parent corporation's resources would be inconsistent with prevailing methods of product design and development in the telecommunications industry.^{10/} Telecommunications equipment and CPE are typically designed using small product design groups or "incubators." Each small design "incubator" possesses a significant level of administrative and fiscal autonomy. Cf. DOJ Preamble to Regulations, 28 C.F.R. part 36, App. B (indicating that such factors weigh against considering a parent corpora-

^{10/} Lucent at 16-18; Consumer Electronics Manufacturers Association at 12; Information Technology Association ("ITI") at 12-13.

tion's financial resources in the ADA context). Each product design group must be financially viable to succeed. Roberts v. Kindercare Learning Centers, 86 F.3d 844, 847 (8th Cir. 1996) (applying readily achievable standard in context of ADA claim, "district court correctly de-emphasized" parent corporation's resources where subsidiary "is responsible and cannot rely on any resources" from parent).

In order for Section 255 to conform to the realities of the product design and development process that it governs, the resources of parent corporations should not be considered in determining what is readily achievable and therefore required. The law respects corporate identity and independence and there is no reason to ignore the legal status of corporate entities in the telecommunications manufacturing context. In fact, disregarding distinct corporate entities would deviate from well-established practice in the context of a host of laws, including civil rights legislation, which holds a corporate parent accountable for the actions of its subsidiaries only in extremely limited circumstances. E.g., Cook v. Arrowsmith Shelburne, Inc., 69 F.3d 1235, 1240-41 (2d Cir. 1995) (outlining requirements for parent corporation liability under Title VII); Rogers v. Sugar Tree Products, Inc., 7 F.3d 577, 581-83 (7th Cir. 1994) (outlining

requirements for parent corporation liability under the Age Discrimination in Employment Act).

B. By Declining to Consider the Resources of Parent Corporations, the Commission Will Promote an Equitable Application of Section 255 To Large and Small Manufacturers

In this NOI, the Commission implicitly recognized that the financial resources component of the readily achievable standard could potentially distort competitive incentives. See NOI ¶ 18. Declining to consider parent corporation resources would promote equitable application of the Act to manufacturers of all sizes and help to prevent such distortion of fair and free competition.

In order to avoid distortion of competitive incentives, the Commission should interpret the readily achievable standard as imposing reasonable obligations upon all manufacturers. Functionally, large and small telecommunications manufacturers develop and design products in essentially the same way, through the use of small, largely independent design groups. Therefore, the level of effort required for each design group, whether a small independent company, or a subsidiary of a larger corporation, to comply with the readily achievable standard should be similar. By adopting this functional approach, the Commission could address the legitimate concerns of small market

players, like Omnipoint, without granting a small businesses exemption, which would unfairly and inappropriately exempt small businesses from making any efforts to provide accessible equipment and services.^{11/}

III. THE READILY ACHIEVABLE STANDARD SHOULD BE APPLIED WITH A LONG-TERM GOAL OF PROMOTING, RATHER THAN CONSTRAINING TECHNOLOGICAL INNOVATION

As Motorola advocated in its initial comments, the Commission should promote technological innovation by implementing long-term strategies to maximize the resources dedicated to accessible product design and development.

A. Section 255 Should Be Implemented With An Emphasis on New Products and Should Not Be Interpreted to Require Retrofitting

In an effort to promote innovation and to maximize results, the Commission should implement Section 255 with a focus on designing new accessible products rather than retrofitting existing ones. Section 255 expressly provides that the resources required to comply with disability access requirements will be limited. See 42 U.S.C. § 12181(9) (defining the readily achievable standard to mean "without much difficulty or

^{11/} Notably, the Telecommunications Industry Association ("TIA"), an organization consisting of large and small equipment manufacturers, opposes both consideration of parent corporation resources and a small business exemption. TIA Reply Comments.

expense."). Given the rapid pace of changing technology, it makes practical sense to devote limited resources to new products, rather than to retrofitting existing ones.

Both industry and advocates for the disabled agree that accessibility features are less costly to implement at the product design stage.^{12/} Moreover, several disability advocacy groups expressly acknowledged that resources may appropriately be directed towards making new products accessible, rather than retrofitting existing ones.^{13/} If Section 255 is applied in a forward-looking manner, applying only to new products, manufacturers will be able to do more to achieve accessibility with the limited resources available for this purpose.

B. The Commission Should Ensure That Any Design Process Standards Ultimately Adopted Do Not Divert Resources From Accessible Product Design and Development

In the initial comments, industry and advocates for the disabled proposed a variety methods for incorporating disability access concerns into the product design process and for monitoring a manufacturer's compliance with Section 255. The

^{12/} In fact, some advocates for the disabled argued that the Commission should require manufacturers to consider accessibility at the product design stage because modifications of existing products would frequently be so costly that such modifications would not be readily achievable. E.g., Self Help for Hard of Hearing People, Inc. ("SHHH") at ¶¶ 29 & 30.

^{13/} E.g., Consumer Action Network ("CAN") at 7.

Commission should ensure that any process-oriented standards that are ultimately adopted do not unnecessarily divert limited resources from accessible product design and development.

1. Declarations of conformity

Several commentors from both industry and the disabled community proposed a declaration of conformity process in which manufacturers would certify that they have complied with Section 255 by making accessible products, to the extent readily achievable. The declaration of conformity proposal has significant potential to provide a clear and uncomplicated mechanism for demonstrating compliance with the Section 255. The Commission should be on guard, however, to avoid a number of potential pitfalls related to a paper-based compliance process, like the declaration of conformity proposal.

Several of the potential pitfalls of a paper-based compliance mechanism, like a declaration of conformity, arise from the current lack of knowledge, both among industry and consumers, related to access engineering for the disabled. Although the telecommunications industry has had some limited experience in addressing accessibility for specific disabilities, such as hearing aid compatibility with phones, no one has any experience designing a universally accessible piece of CPE. As

Lucent and others correctly point out, both industry and the disabled community are at the very beginning of the learning process related to access engineering.^{14/}

While the proposed declaration of conformity or some other type of certification of compliance with Section 255 may be a desirable end-goal, such a declaration or certification process may be premature given current inexperience with disability access issues. At this stage of the Section 255 implementation process, a compliance process based upon a declaration of conformity could generate confusion for consumers and be applied in a way that is inconsistent with the readily achievable standard.

First, a declaration of conformity or other paper-based process for certifying compliance with Section 255, at this stage, has the potential to generate substantial confusion for disabled consumers. Several of the commentators that endorsed a declaration of conformity procedure suggested that the declaration would be shipped with each piece of equipment or CPE. Presumably, such a declaration would indicate that the manufacturer complied with Section 255 in designing, developing, and fabricating that product.

^{14/} Lucent at 3; Jo Waldron at 20; Dana Mulvaney at ¶ 32.

A disabled consumer could easily misconstrue a declaration of conformity to mean that the product is universally accessible to all persons with disabilities. In reality, a manufacturer could be in compliance with Section 255, making such a declaration appropriate, even though the equipment or CPE was inaccessible, because accessibility was not readily achievable.

Given the current state of technology, it is almost certainly impossible to make a truly universally accessible piece of CPE. Instead, manufacturers seeking to comply with the Act will produce products that are accessible to some disabilities but not others. The proposed declaration of conformity will not provide a disabled consumer with the information that he or she needs to know -- whether the product is accessible to his or her specific disability.

Second, the declaration of conformity proposal connotes that manufacturers must demonstrate compliance with Section 255 on a model-by-model basis, a connotation that likely overreaches the readily achievable standard.

Since the readily achievable standard requires only those measures that are "easily accomplishable and able to be carried out without much difficulty or expense," 42 U.S.C. § 12181(9), in the ADA context, the readily achievable standard has been interpreted as containing an implicit temporal

component. First Nat'l Bank Assoc. v. FDIC, 79 F.3d 362, 371 (3d Cir. 1996) ("[W]hat is easily accomplishable in one year may not be easily accomplishable in one day, so a determination of what is 'readily achievable' depends upon the passage of time."). Furthermore, DOJ, in its regulations implementing the ADA, recognized that the readily achievable standard did not mandate the immediate removal of all barriers. DOJ Preamble, 28 C.F.R. § 36, App. B (commenting on § 36.104) (indicating that it is "appropriate to consider the cost of other barrier removal actions as one factor in determining whether a measure is readily achievable."). Recognizing that the resources required to comply with the readily achievable standard were limited, DOJ, in its regulations, established priorities concerning which types of barriers should be removed first. 28 C.F.R. § 36.304 (1995).

Based in part upon the ADA analogy, the Commission should not, at this early stage of Section 255 implementation, require a model-by-model demonstration of accessibility. A declaration of conformity or any other certification process that would require a manufacturer to demonstrate for each product model that accessibility has either been achieved or is not readily achievable, at this point, would be both premature and inconsistent with the statute. An alternative approach that would be consistent with the readily achievable standard at this

early stage, would be to permit manufacturers to declare or certify compliance by citing their overall level of effort towards achieving accessibility, rather than requiring representations related to specific product models. As set forth in more detail below, at this stage of technological development, compliance would more appropriately be assessed based upon the overall accessibility to the disabled of equipment available in the marketplace, not whether each product model is accessible.

2. Consultation with the disabled

In addition, commentors from both industry and the disabled community support manufacturers consulting with the disabled as part of the product design process. Motorola agrees that voluntary consultation with the disabled at the product design stage can be a useful tool for understanding and addressing accessibility needs.

If the Commission chooses to adopt some kind of consultation requirement, it should be flexible enough to ensure that such consultation substantially furthers the overriding goal of increasing the accessibility of telecommunications equipment and CPE available to disabled consumers. As Lucent noted in its comments, both industry and the disabled community are at the very beginning stages of the learning process regarding

accessible telecommunications technology.^{15/} Furthermore, several disabled commentators acknowledge that individuals are not experts in accessibility needs simply because they are disabled.^{16/} Currently, there are probably not enough qualified consultants to satisfy a mandatory consultation requirement for all manufacturers and service providers.

While consultation with the disabled has a potentially appropriate role in demonstrating compliance with Section 255, the Commission should avoid inflexible consultation requirements that could degenerate into little more than a pro forma exercise. Rather, the Commission should encourage manufacturers to consult with the disabled voluntarily when such consultation would be an efficient use of limited resources.

IV. COMPLIANCE WITH SECTION 255 SHOULD BE ASSESSED BASED UPON THE OVERALL ACCESSIBILITY TO THE DISABLED OF EQUIPMENT AVAILABLE IN THE MARKETPLACE, NOT WHETHER EACH PRODUCT MODEL BY EACH MANUFACTURER IS ACCESSIBLE

The readily achievable standard should be applied in the telecommunications equipment context with an overall market view towards maximizing the range of products that are accessible to individuals with widely divergent disabilities. Consequently, the Commission should assess a manufacturer's compliance with

^{15/} Lucent at 3.

^{16/} See Jo Waldron at 20; Dana Mulvaney at ¶ 32.